



# WE AGREED TO WHAT IN THIS CONTRACT?

**HOW DO I AVOID GETTING IT AGAIN?**

**WHAT COULD WE HAVE DONE TO PREVENT IT?**

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# Why is it a problem?

- It's Ambiguous – Reasonable people can disagree about the meaning and how the parties are supposed to use it in administering the contract
- While the wording is clear, it is used to hinder management in taking actions necessary to accomplish its mission; (or the why in the world did you agree to this language anyway)
- The provision sets up a set of procedures that slows an entire personnel process (e.g. discipline, staffing, etc.)

# Examples of Ambiguous Language

- Intentional – “The Employer agrees, mission requirements permitting, to allow union representatives to leave their assigned duties for **reasonable periods of time**, when required to perform authorized representation duties. Prior to doing so, the union representative will complete the form found in Appendix A.”
- Did anything to get agreement – “Employees seeking voluntary reassignment shall be entitled to **prompt and fair** consideration.”

# Ambiguous examples (Cont.)

- "Disciplinary actions will only be taken for **just** cause."
- "Requests for LWOP will be given **serious bona fide consideration**. "
- "Employees will be selected for such training on a **fair and equitable basis**, i.e., consistent with the needs of the service and free of personal favoritism."
- "The union will be **predecisionally involved** in bargaining unit determinations for position changes and establishment of new positions."
- Inadvertent – "Overtime for qualified personnel will be distributed in accordance with the **shop's seniority roster**."

# Clear but Problematic Language

- “Should management fail to comply with the time limits at step 2 or step 3, the grievance shall be resolved in favor of the grievant provided the remedy requested by the grievant is legal and reasonable under the circumstances.”
- “Employees detailed to a higher graded position for a period of more than 10 days must be temporarily promoted. The employee will be paid for the temp promo beginning the 1st day of the detail. The 10 consecutive day provision will not be circumvented by rotating employees into a higher-graded position for less than 10 days in order to avoid the higher rate of pay.”

# Procedures Examples

- "The employer agrees to inform an employee, prior to giving the employee an advanced notice of proposed disciplinary action, of the employer's intention to initiate such action and the reasons therefore."
- "Management will investigate an incident or situation as soon as possible to determine whether or not discipline is warranted. The employee who is the subject of the investigation will be informed of their right to representation before any questioning takes place."

# More examples of bad language

- "Vacancy announcements will be posted via email at least seven (7) calendar days prior to the hiring action being sent to the servicing Human Resources Office (HRO)."
- "Overtime work assignments will be rotated equally among personnel of each craft and position to ensure that all personnel receive the opportunity to work overtime."

# PROBLEM PROVISIONS

## DEALING WITH A PROBLEM

STEP 1 – ANALYSIS

STEP 2 – DEVELOP OPTIONS

STEP 3 –IMPLEMENT APPROACH

# PROBLEM PROVISIONS

## Step 1 Analysis

- A. How does the provision operate / what does it do?
- B. How would a 3rd party interpret and apply it?
- C. How long has it been in the contract?
- D. Is the union dissatisfied with the provision?
- E. How big is the problem and how often does it arise?
- F. Is pursuing a change worth the effort?

# PROBLEM PROVISIONS

- Step 1 Analysis
- A. How does the provision operate / what does it do?
  - What other provisions affect it or does it impact?
  - What internal personnel / regulations are involved in dealing with it?
    - Supervisors / Managers (how)
    - Human Resource / Legal / Security (how)
  - Are external personnel / regulations (e.g. IGs or DFAS) impacted? (who and how)

# PROBLEM PROVISIONS

- Step 1 Analysis
- B. How would a 3rd party interpret and apply it?
  - Contracts are interpreted as a whole (if possible) in order to give effect to all parts of the agreement.
  - Unless a provision is ambiguous, 3rd parties will not look outside the contract language.

# PROBLEM PROVISIONS

- Step 1 Analysis
- B. How would a 3rd party interpret and apply it? (Cont.)
  - What was the intent of the original parties in crafting the language?
    - The mutual intention of the parties AT THE TIME OF THE AGREEMENT will govern the resolution of a contractual dispute IF that intention can be determined and IF that intention is lawful.

# PROBLEM PROVISIONS

- Step 1 Analysis
- B. How would a 3rd party interpret and apply it? (Cont.)
  - What was the intent of the original parties in crafting the language?
    - The written terms themselves will determine intent, if the language is “clear and definite.”
    - If the language is NOT clear and definite, 3rd parties will consider outside evidence to determine intent and meaning.

# PROBLEM PROVISIONS

- STEP 1 - ANALYSIS

C. How long has it been in the contract?

- C1. If it's in previous editions of the contract, what is the history of the provision?
  - Does anyone remember (or do bargaining notes still exist to show) what issue it was meant to address (and why the language was selected)? If so, does that problem, or a similar issue, still exist?
  - Have there been previous attempts to amend or delete this provision? If so, what were the results?

# PROBLEM PROVISIONS

- STEP 1 - ANALYSIS
  - C2. If it's only been in the contract since the last full CBA negotiation (or the last mid term bargaining) do the bargaining notes cover it?
    - What issue was it meant to address?
    - Does that problem, or a similar issue, still exist?
    - Why did management agree to the language?

# PROBLEM PROVISIONS

- STEP 1 - ANALYSIS
  - D. Is the union dissatisfied with the provision?
    - If so, is the language the problem, which might provide some room for discussion?
      - **OR**
      - Is the union's problem with management's attempts to "work around" the language?
    - If not, how amenable has the union been in dealing with similar issues in the past?

# PROBLEM PROVISIONS

- STEP 1 - ANALYSIS
  - E. How big is the problem and how often does it arise?
    - **Level 1.** Affects Operations - Management is prevented from effectively managing the workforce due to this single provision. (It's occurred 9 times in the last quarter).
    - **Level 2.** Costly – A number of grievances over the issue have been filed and case processing is expensive. (There have been 11 cases in the last 2 years).
    - **Level 3.** Hassle – Management has occasional trouble understanding and/or complying with the provision.
    - **Level 4.** I really hate this sucker - It's gotta GO!!!! I just read it.

# PROBLEM PROVISIONS

- STEP 1 - ANALYSIS
  - F. Is pursuing a change worth the effort?
    - **Level 1.** Affects Operations – Oh yeah!
    - **Level 2.** Costly – Has management been “losing” the cases? AND Is there sufficient angst to pursue a change?
    - **Level 3.** Hassle – Is there an easier way to handle this (e.g. improved supervisory/managerial training)?
    - **Level 4.** I really hate this sucker - Get over it!

# PROBLEM PROVISIONS

## STEP 2 – DEVELOP OPTIONS

- A. Could amended language meet the needs of the union, and be acceptable for management?
- B. Does the entire provision have to be deleted for effective operations under the contract?

# PROBLEM PROVISIONS

## STEP 2 – DEVELOP OPTIONS

A. Could amended language meet the needs of the union, and be acceptable for management?

- This applies when the current provision continues to address a legitimate issue
- Determine and list MANAGEMENT'S INTERPRETATION of the union's NEEDs for the issue.
- NO – this is not Interest Based Negotiation – it is listing the points that need to be addressed in drafting new language and focusing on the underlying issue.

# PROBLEM PROVISIONS

## STEP 2 – DEVELOP OPTIONS

A. Could amended language meet the needs of the union, and be acceptable for management? (Cont.)

- Craft language that accurately addresses the underlying issue, addresses each “need” and is clear in both intent and procedure.
- Double check it for accuracy and effectiveness by testing the language – run some internal mock scenarios.
  - How long will it take to complete a required procedure under the proposed changed language?
  - How much will it cost/save?

# PROBLEM PROVISIONS

## STEP 2 – DEVELOP OPTIONS

- A. Could amended language meet the needs of the union, and be acceptable for management? (Cont.)
- From your testing determine the difference in “cost” and “time” investment – be careful and accurate
  - Document ... document ... document!!

# PROBLEM PROVISIONS

## STEP 2 – DEVELOP OPTIONS

B. Does the entire provision have to be deleted for effective operations under the contract?

- Determine the “cost” and “time” investment of the current system versus the “cost” and “time” investment of having the agreement without the provision. Again, care and accuracy are paramount.
- Document ... document ... document!!

# PROBLEM PROVISIONS

## STEP 3 –IMPLEMENT APPROACH

- Prepare as if you are going to Impasse (you may well be)
  - Provable costs/effects of current language
  - Provable positive impacts of change
  - Double check ALL your facts and numbers
- Prepare your proposal for delivery to the union
- Take it to the table

# PROBLEM PROVISIONS

## DEALING WITH A PROBLEM

STEP 1 – ANALYSIS

STEP 2 – DEVELOP OPTIONS

STEP 3 –IMPLEMENT APPROACH

# PROBLEM PROVISIONS

- A LITTLE RESPECT –
- “The Parties agree to mutually establish and maintain a safe and respectful work environment that promotes good workmanship, values employees for who they are and what they contribute, ensures consistent treatment of employees, and maintains high standards of employee performance.”

# PROBLEM PROVISIONS

- A LITTLE MORE RESPECT –
- “In granting official time to process grievances, the parties agree that typically, two hours to interview and draft a grievance is rebuttably reasonable. Further, one hour of official time for the grievant is rebuttably reasonable.”

# PROBLEM PROVISIONS

- PROACTIVE WEINGARTEN PROVISION –
- “When any management representative interviews an employee in connection with an investigation, the employee will be notified of his/her right to union representation, and questioning will not occur until the union representative arrives.”

# PROBLEM PROVISIONS

- OR
- PROACTIVE WEINGARTEN PROVISION (2) –
- “When management determines a need to interview an employee in connection with an investigation, regardless of the level or organizational assignment of the management investigator, it will notify the union prior to notifying the employee. No questioning will occur until the union representative arrives.”

# PROBLEM PROVISIONS

WHO'S MAKING THE SELECTION?

MANAGEMENT????

"Bargaining unit employees will receive first consideration for all vacancies. After rating and ranking, the selecting supervisor will receive the list of qualified current personnel. Any request to consider any listing of fully qualified personnel who are not in the bargaining unit, must be accompanied by a written justification as to why each of the referred bargaining unit employees is unacceptable."

# PROBLEM PROVISIONS

- CAN I GET THE ANSWER OUT ON TIME?
- Version 1 – “In the event management does not render a timely decision at any step of the negotiated grievance procedure, the requested remedy, to the extent lawful, will be implemented.”
- Version 2 – “In the event the responding party does not render a timely decision at any step of the negotiated grievance procedure, and if arbitration is invoked, that party will pay all costs of arbitration.”

# FINAL THOUGHTS

- If the original language was ordered by FSIP –
  - You are not going to get anywhere easily
  - Documenting your case becomes even more important
- When you can, try to make changes in small steps –
  - Small changes are easier to sell
  - Start with the worst part(s) first
  - Remember long term strategy is difficult in contract negotiations